IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.125 of 1996.
Reserved on: 11.06.2007.
Decided on: July 04, 2007

Devi Dass ***…..Appellant.***

VERSUS

Kanwar Sen & Ors. ***…..Respondents.***

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Mr.Ashwani K. Sharma, Advocate.**

For the Respondents: **Mr.K.D.Sood, Advocate**

Kuldip Singh, Judge

The plaintiff is in appeal against the judgment and decree dated 4.1.1996 passed by learned District Judge, Hamirpur in Civil Appeal No.90 of 1990 setting aside judgment and decree dated 25.4.1990 passed by learned Sub Judge(1), Hamirpur in Civil Suit No.22/87. The parties are referred in the same manner as were in the trial Court.

2. The facts, in brief, are that the plaintiff filed a suit for declaration, mandatory and prohibitory injunction to the effect that plaintiff has right of path over land comprised in Khata No.181 min

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

Khatauni No.193 min Khasra Nos.223/2/1 measuring 0-3 Marlas (for short 'suit land') leading from the house of plaintiff to his land bearing Khasra Nos.221/1 and 223/1 situate in village Seri, Tappa Dalori, Tehsil and District Hamirpur and the defendant be restrained from obstructing the passage.

3. The further case of the plaintiff is that he is owner in possession of 3 Kanals 16 Marlas land comprised in Khasra No.221/1 and 223/1. The plaintiff has been using the suit land as passage for his own land for the last 40 years without any obstruction. The land comprised in Khasra Nos.223/2 measuring 6 Marlas was owned by Ram Dass who had sold it to Gian Chand and Gian Chand had sold the suit land out of Khasra No.223/2 to defendant. Ram Dass vide agreement dated 26.2.1961 had allowed the plaintiff to use the suit land as passage. On 2.3.1987, the defendant had started raising construction of wall on the suit land and obstructed the passage. In these circumstances, the suit was filed.

4. The suit was resisted by the defendant by filing written statement in which he has taken preliminary objections that plaintiff has no locus standi, cause of action, he is estopped from filing the suit, the suit is bad for want of necessary parties, the suit is not maintainable and the suit is time barred. On merits, the defendant denied the passage of plaintiff on suit land. The agreement of Ram

Dass with plaintiff was also denied with the plea that it was never acted upon. The wall was constructed by defendant on his own land and earlier to filing of the suit, the plaintiff never raised any objection when the construction was raised.

5. The trial Court on 25.4.1990 decreed the suit for declaration, mandatory injunction and permanent prohibitory injunction and it was held that plaintiff has right of passage over land comprised in Khata No.181 min, Khatauni No.193 min, Khasra No.223/2/1 measuring 3 Marlas vide *Jamabandi* for the year 1981-82 with the direction to the defendant to remove the wall there from and he was restrained from blocking or causing interference with the passage of the plaintiff.

6. Gopal Dass filed appeal against the decision dated 25.4.1990, during the pendency of the appeal he died and his legal representatives were brought on record. The lower appellate Court allowed the appeal on 4.1.1996 and dismissed the suit of the plaintiff. In this way, the plaintiff has come in second appeal against the impugned judgment and decree.

7. The appeal has been admitted on the following substantial questions of law:-

(i) Whether right of easement can be created by executing an Agreement inter-se the

parties and what is the effect of such Agreement?

(ii) That right of passage exercised over a land “as of right” amounts to the existence of an easementary right?

(iii) Whether the right of easement gets extinguished with the sale of a portion of land by the actual owner?

(iv) Whether the impugned judgment of reversal and decree in appeal is sustainable in the eyes of law?

8. I have heard the learned counsel for the parties and have also gone through the record.

9. The learned counsel for the appellant / plaintiff has submitted that the plaintiff was using the passage on the suit land by way of easement. In addition to this, Ram Dass owner of the suit land vide agreement Ext.P-1 allowed passage to the plaintiff. Therefore, plaintiff has right of passage over the suit land. The defendant had obstructed the passage, hence, plaintiff is entitled to decree of permanent prohibitory injunction as well as mandatory injunction. The learned counsel for the legal representatives of defendant has submitted that in fact no substantial question of law is involved in the

present appeal. The plaintiff is claiming passage on the suit land which is 3 Marlas. The alleged passage has not been identified either in plaint or in evidence. The plaint is not in conformity with order 7 Rule 3 C.P.C. The plaintiff has failed to prove any passage either by way of alleged agreement Ext.P-1 or otherwise. The alleged easement claimed by plaintiff for the passage has not been pleaded in accordance with law.

Substantial questions of law No.(i) to (iv):

10. The substantial questions of law are interconnected and, therefore, have been taken collectively for determination. As per agreement Ext.P-1 Ram Dass had given 7 Marlas of land consisting of Khasra No.223 measuring 6 Marlas and Khasra No.221 measuring 1 Marla for carving out path for general use of the community including Dasaundhi Ram father of the plaintiff. It is the case of the plaintiff that defendant had purchased 3 Marlas land comprising Khasra No.223/2/1 from Gian Chand. It has not been proved on which part of the suit land there is a passage. The passage has not been identified in the plaint or in the evidence. It is not the case of the plaintiff that whole of the suit land is passage. The plaint is not in conformity with Order 7 Rule 3 C.P.C. so as to identify the passage. In absence of identification of the passage it is not possible to give declaration, prohibitory and mandatory injunction pleaded by the plaintiff. Ram

Dass (PW-2) party to Ext.P-1 agreement has deposed that he had given path to Dasaundhi Ram but later on he sold the same land to Gian Chand. He has admitted that no site plan was prepared showing the path and the Khasra Nos which were to be connected by the path. The lower appellate Court on appreciation of evidence has come to the conclusion that as per agreement Ext.P-1 path never came into existence. The agreement Ext.P-1 was never implemented. On the contrary, in violation of agreement Ext.P-1 Ram Dass sold entire 6 Marlas land comprised in Khasra No.223 to Gian Chand who further sold 3 Marlas land to defendant. Once the existence of the path has not been established as a finding of fact then there is no question of exercise of right of easement by plaintiff on alleged path. The lower appellate Court has rightly appreciated the material on record in returning the finding that there is no path on the suit land. In these circumstances, plaintiff has no right to claim declaration, prohibitory and mandatory injunction with respect to the suit land.

11. The result of the above discussion is that plaintiff has failed to prove existence of a path on the suit land even by way of agreement, he has also failed to prove that such path was being used by him for the last 40 years on the basis of material on record. There is force in the submission of learned counsel for the legal representatives of the defendant that no substantial question of law is

involved in the appeal. The substantial questions of law No.(i) to (iv) are answered against the plaintiff and in favour of legal representatives of the defendant.

12. In the result, the appeal is dismissed with no order as to costs.

July 04, 2007 **(*Kuldip Singh*)**
(soni) ***Judge***